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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 HEZEKIAH UBA ORJI,

12 v.
13 Plaintiff,

14 JANET NAPOLITANO, Secretary of the
15 Department of Homeland Security,

16 Defendant.

17 CASE NO. C11-898MJP

18 ORDER DENYING PLAINTIFF'S
19 MOTION FOR SUMMARY
20 JUDGMENT AND MOTION FOR
21 DEFAULT JUDGMENT

22 This matter comes before the Court on Plaintiff Hezekiah Uba Orji's motion for summary
23 judgment. (Dkt. No. 17.) Having reviewed the motion, Defendant's opposition to the summary
24 judgment motion (Dkt. No. 22), Plaintiff's reply (Dkt. No. 24), and all related documents, the
Court DENIES Plaintiff's motion for summary judgment.

The Court also DENIES Plaintiff's motion for default judgment, which is combined with
Plaintiff's reply brief on his motion for summary judgment. (Dkt. No. 24.) In considering
Plaintiff's motion for default judgment, the Court has reviewed Plaintiff's supplemental brief

1 (Dkt. No. 25), his declaration (Dkt. No. 27), and Defendant's opposition to the motion for default
2 judgment (Dkt. No. 28.)

3 **Background**

4 Plaintiff Hezekiah Uba Orji, who is proceeding pro se, filed this suit alleging that
5 Defendant Janet Napolitano, the Secretary of the Department of Homeland Security,
6 discriminated against him by not promoting him because of his race, national origin, and sex.
7 (Dkt. No. 17 at 3.) Plaintiff also asserts that he has been subject to reprisals because of his prior
8 EEO activity. (Id.) Plaintiff is employed as an Adjudications Officer with the United States
9 Citizenship and Immigration Services ("USCIS") within the Department of Homeland Security.
10 (Dkt. No. 22 at 2.)

11 Plaintiff's complaint centers on an incident in November 2006 when he was not selected
12 for a promotion to the position of Immigration Officer (Fraud Detection and National Security),
13 GS-1801-11/13, in the Seattle District office of USCIS. (Dkt. No. 1 at 2.) Plaintiff alleges that he
14 was passed over because he is a Black man of Nigerian origin, and that the Seattle office has an
15 informal preference for White women and Asians. (Dkt. No. 17 at 13.)

16 Beyond this single incident, Plaintiff also alleges a pattern of discrimination, and asserts
17 that he has responded to more than 25 job openings within USCIS without success. (Id.) He asks
18 the Court to promote him retroactively, and award him back pay and damages. (Dkt. No. 1 at 3.)
19 He also asks the Court to retain jurisdiction in order to supervise hiring and promotion practices
20 at the Seattle office of USCIS. (Id. at 15-16.) Plaintiff's complaint uses the language of both
21 disparate treatment and disparate impact, although his administrative case only discusses
22 disparate treatment. (Dkt. No. 23-12 at 1.)

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1 The timing of Plaintiff's summary judgment motion is unusual. The discovery deadline in
2 this case is not until May 25, 2012. Plaintiff asserts that summary judgment is appropriate now
3 because "Plaintiff Orji has so far presented both direct and indirect evidence in this case beyond
4 a reasonable doubt." (Dkt. No. 24 at 3.) Defendant USCIS argues that this motion is premature
5 because discovery has not ended and Plaintiff's motion fails to state with any clarity what causes
6 of action he is seeking summary judgment on. (Dkt. No. 22 at 1.)

Discussion

I. Summary Judgment

9 Plaintiff does not merit an award of summary judgment at this point because he has not
10 met the high bar required to show that no fact issues remain in this case. Federal Rule 56(a)
11 states that a court “shall grant summary judgment if the movant shows that there is no genuine
12 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
13 Civ. P. 56(a). The party seeking summary judgment must “identify those parts of the record that
14 indicate the absence of a genuine issue of material fact.” Brinson v. Linda Rose Joint Venture, 53
15 F.3d 1044, 1048 (9th Cir. 1995). Once the moving party has made this showing, the nonmoving
16 party must “designate specific facts showing that there is a genuine issue for trial.” Celotex Corp.
17 v. Catrett, 477 U.S. 317, 324 (1986).

18 As an initial matter, the Court notes that Defendant incorrectly asserts that a motion for
19 summary judgment is premature. (Dkt. No. 22 at 1.) While it may not be advantageous for a
20 party to move for summary judgment before the discovery process has yielded a sufficient record
21 to support such a motion, the Federal Rules clearly state that “a party may file a motion for
22 summary judgment at any time until 30 days after the close of all discovery.” Fed. R. Civ. P.
23 56(b). Here, Plaintiff’s motion was filed in accordance with the rules, so it is properly before the
24 Court.

1 Here, Plaintiff's motion for summary judgment fails because Plaintiff does not provide
2 adequate evidentiary support to show that no genuine issues of material fact remain. Federal
3 Rule 56 requires that on a summary judgment motion, a party must "support the assertion [that a
4 fact cannot be disputed] by . . . citing to particular parts of materials in the record, including
5 depositions, documents, electronically stored information, affidavits or declarations, stipulations
6 (including those made for purposes of the motion only), admissions, interrogatory answers, or
7 other materials. Fed. R. Civ. P. 56(c)(1)(A). Here, although Plaintiff asserts that he has presented
8 evidence that proves his case "beyond a reasonable doubt," he does not support this assertion by
9 citing to particular parts of materials in the record. (Dkt. No. 24 at 3.)

10 Plaintiff's primary support for his motion comes from his general references, without
11 specific citations, to the Report of Investigation ("ROI") that was used in his administrative
12 hearing. (Dkt. No. 17 at 6-7; Exhibits 1-20.) Rather than providing support for Plaintiff's motion
13 for summary judgment, the ROI instead suggests that a number of material facts remain for trial.
14 For example, Exhibit 9 contains Plaintiff's affidavit affirming that he believes his experience and
15 training were not considered in the USCIS promotion decision, but that his race, national origin,
16 and sex were the determinative factors. (ROI, Ex. 9 at 4.) However, Exhibit 12 contains the
17 affidavit of Affidavit of Assistant Field Office Director Jack Bennett, who states that he made the
18 promotion decision based on "who I felt was the best qualified for the job." (ROI, Ex. 12 at 3.)
19 Similarly, Exhibit 13 contains the affidavit of Rand Gallagher, USCIS Chief of Staff, HQ Fraud
20 Detection and National Security, who states that the selection was made based on "experience
21 and ability," not race. (Ex. 13 at 3.) Without specific discussion of the ROI and why the portions
22 supporting his argument deserve more weight than those opposing his argument, Plaintiff's
23 motion for summary judgment is not sufficient to support a finding that no material facts remain.
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1 While Plaintiff is correct that Defendant has not challenged some of the factual issues
2 mentioned in the ROI, these uncontested fact issues are not “material.” (Dkt. No. 17 at 7.) A
3 fact is “material” if it might affect the outcome of the suit under the substantive law applicable to
4 the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). However, in many cases, a
5 fact that would otherwise be material to a claim is rendered immaterial by the failure of the party
6 making the claim to establish some other essential element of the claim. Celotex, 477 U.S. at
7 323. That is exactly the case here. Plaintiff asserts that “the fact that the plaintiff is Black,
8 Nigerian by origin, a Man, and has prior EEO activity is established.” (Dkt. No. 17 at 7.) He also
9 asserts that the ROI states that only 1 of 32 employees in the office is Black, and that he “has
10 continuously sought promotional opportunities over 25 times since his initial participation in
11 EEO activity is also established.” (*Id.*) However, while these facts may support some of
12 Plaintiff’s substantive law claims, they are rendered immaterial by Plaintiff’s failure to establish
13 other essential elements of the claim—namely that discrimination occurred.

14 Plaintiff’s other submissions also do not support his motion for summary judgment or
15 demonstrate that no genuine issues of material fact remain. Plaintiff’s declaration, which he filed
16 as a “Supplemental to Answer to Defendant’s Response to Plaintiff’s Motion for Summary
17 Judgment & Motion for Default Judgment,” contains allegations his supervisors intentionally
18 manipulated the selection process by adding the qualifications of speaking Korean and being a
19 denial writer after the position was announced. (Dkt. No. 25 at 2.) While this allegation may
20 suggest discriminatory, or at least unfair, conduct, it is not, by itself, proof sufficient to entitle
21 Plaintiff to judgment as a matter of law. Anderson, 477 U.S. at 250.

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1 II. Disparate Treatment

2 An analysis of the elements of each of Plaintiff's claims also reveals that summary
3 judgment is inappropriate at this time. Genuine issues of material fact remain regarding
4 Plaintiff's disparate treatment claim because he has not proven that he was harmed because of
5 his race, national origin, or sex. "A disparate treatment claim cannot succeed unless the
6 employee's protected trait actually played a role in that process and had a determinative
7 influence on the outcome." Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993). Here, Plaintiff
8 cites no facts that prove that race was the motivating factor behind him being passed over for
9 promotion. Plaintiff asserts that his candidacy was negatively impacted when the Assistant
10 District Director for Adjudications wrote an email to the selecting official adding additional
11 qualifications not mentioned in the original announcement. (Dkt. No. 17 at 8.) However, at no
12 point in his motion does Plaintiff specifically allege that these additional qualifications had
13 anything to do with his race, sex, or national origin. (Id.)

14 Plaintiff also fails to rebut Defendant's evidence that the officer in charge of the
15 promotion decision, Assistant Field Director Jack Bennett, made the promotion decision based
16 on who he reasonably thought would be the most qualified, including who he thought would be a
17 better supervisor and who was a better writer. (Dkt. No. 23-2 at 1-3). Once a defendant has
18 offered a non-discriminatory reason for its employment action, to prevail on a claim of
19 discrimination the plaintiff must offer evidence that either "a discriminatory reason more likely
20 motivated the employer to make the challenged employment decision" . . . or that "the
21 employer's proffered explanation is unworthy of credence." Cornwell v. Electra Central Credit
22 Union, 439 F.3d 1018, 1028 (9th Cir. 2006). Because Plaintiff does not rebut this evidence,
23 genuine issues of material fact remain as to the issue of disparate treatment.

24 III. Disparate Impact

1 Plaintiff also fails to prevail on summary judgment on his disparate impact claim because
2 he does not prove that a particular employment practice caused a disparate impact on the basis of
3 membership in a protected class. 42 U.S.C. § 2000e-2(k)(1)(A)(I). A Plaintiff seeking to make a
4 claim for disparate impact must identify with particularity the employment practice being
5 challenged. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). Here, Plaintiff asserts that
6 few Black men are hired in senior positions at the USCIS Seattle office, but he does not identify
7 a specific employment practice that may be responsible for this trend. (Dkt. No. 17 at 13.)

8 In the record of his administrative hearing, Plaintiff alleged in broad terms that the Seattle
9 USCIS office has a policy of “promoting employees to excite morale,” and that this policy has
10 the effect of benefiting women, because most employees are women. (ROI at 5.) However, this
11 broad allegation does not constitute a “specific employment practice,” and, in any case, Plaintiff
12 did not specifically address this practice in his motion for summary judgment or provide
13 evidence that it is responsible for the relatively low numbers of African Americans in the Seattle
14 office. (Dkt. No. 17.) Therefore, Plaintiff does not meet the requirement of identifying with
15 particularity the employment practice being challenged. Wards Cove, 490 U.S. 642.

16 A plaintiff also must establish that the practice being challenged caused the observed
17 imbalance between the employer’s workforce and the area population. EEOC v. Joe’s Stone
18 Crab, Inc., 220 F.3d 1263 (11th Cir. 2000). Because Plaintiff does not identify a specific
19 employment practice, he cannot demonstrate that it caused the racial or gender imbalance.

20 IV. Retaliation

21 Plaintiff also fails to establish his retaliation claim. To establish a prima facie case of
22 retaliation, a plaintiff must show: (1) he engaged in a protected activity; (2) he was subjected to
23 an adverse employment action against him; and (3) there is a causal connection between the
24 protected activity and the adverse action. Vasquez v. County of Los Angeles, 349 F.3d 634, 646

1 (9th Cir. 2003). Here, while Plaintiff asserts that he engaged in protected EEOC activity and that
2 he was subjected to an adverse employment action by failing to obtain a promotion, he fails to
3 point to any evidence of the required causal connection between the two. (Dkt. No. 17 at 8-10.)
4 Plaintiff simply asserts that “he has suffered various forms of retaliation, including interference
5 with his promotional opportunities.” (*Id.* at 8.) This is insufficient to support a claim for
6 retaliation because it does not explain the basis for any causal connection.

7 V. Default Judgment

8 Plaintiff’s motion for default judgment also fails because Defendant has not defaulted in
9 this case. Federal Rule 55 states, “When a party against whom a judgment for affirmative relief
10 is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or
11 otherwise, the clerk must enter the party’s default.” Fed. R. Civ. P. 55(a). Here, while Plaintiff
12 argues that he “seeks default judgment for the defendant’s failure to provide legal backing for
13 discriminatory and retaliatory activities, which, to date, is reflective of her Workforce profile,”
14 this misunderstands the technical definition of the term “default.” (Dkt. No. 25 at 3.)

15 In this case, Defendant has not failed to plead or otherwise defend the matter. Defendant
16 filed an answer to Plaintiff’s complaint (Dkt. No. 14), and has continued to file responsive briefs
17 to Plaintiff’s motions. (Dkt. Nos. 22, 23, 28.) Plaintiff may object to the substance of
18 Defendant’s pleadings, but, in a technical sense, Defendant has not defaulted. Therefore,
19 Plaintiff’s motion for default judgment is DENIED.

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Conclusion

Because Plaintiff does not provide evidence sufficient to show that there is no genuine issue of material fact, the Court DENIES Plaintiff's motion for summary judgment. Because Defendant has not failed to plead or otherwise defend, Plaintiff's motion for default judgment is also DENIED.

6 The clerk is ordered to provide copies of this order to all counsel.

7 Dated this 16th day of February, 2012.



Marsha J. Pechman
United States District Judge